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INVITATION FOR CONTRIBUTING AN ARTICLE

Readers are invited to contribute article/s for the Journal. The article should be on a topic of current relevance on Corporate Law, Tax Law, or on any other matter or issue relating to Economic or Commercial Laws. The article should be original and of around 7-8 pages in word file (approx. 2500 words). Send your articles at email id : articles@vidhimaan.com along with your student registration number. The shortlisted articles shall be published in the Journal.

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Correspondence:

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MESSAGE FROM THE PRESIDENT

My Dear Students,

Without Hard work and Discipline, it is difficult to be a top professional and without Knowledge and Constant learning, it is impossible to continue as a top professional.

Friends, the maxim becomes apt, when we talk about the emerging trends of good governance beneath Vision New India -2022. With the fact of registering our rising power at the globe, India is witnessing significant steps towards social and financial inclusion for ensuring holistic development of all sections of the society.

Inter-alia, when Corporate Governance is significant in the agenda of 'Pro-People, Pro-Active and Good Governance' (P2G2), the responsibilities of the governance professionals also turns many fold in setting up the corporate culture of the nation under the best principles of governance and compliance. Capturing the spirit of strengthened governance in the corporates, our Institute is also in high spirits for advancing the value driven professional services of the company secretaries in determining the corporate culture of the nation.

With this, Institute is not leaving any stone unturned while advancing the knowledge and understanding of its professionals in the emerging trends of governance counting big ticket transformations including GST, Insolvency and Bankruptcy Code, 2016; The Real Estate (Regulation and Development) Act, 2016; Regulation related to Cross Border Merger, Rules relating to Foreign Investment, Companies Amendment Act, 2017, Capital Market Reforms, Labour Law Reforms and alike.

Be it the Golden Jubilee Year National Conference of Practicing Company Secretaries (19th Edition) with successfully capturing the theme of on the 'PCS: A Value Driven Professional' or the Publications of the Institute, or the New Study Material for New Syllabus, or the release of the Exposure Draft of ICSI Guidance on Diligence Report on Governance For Banks; all the marking a deep impact towards the advanced understanding of professionals with leading a triumph of good governance throughout the globe.

Friends, in addition to all these attempts towards conquering the field of our professional excellence, the Institute has also initiated a dedicated portal of Career Counselling in order to strengthen the visibility of the Profession pan India along with apprising the budding professionals on the opportunities under the profession.

With this, let us be assured that our alma mater is in out and out support and service of its professional excellence for building the nation under the prospect of good governance for all.

Last but not the least, my good wishes to all the students appearing in June 2018 exams of Company Secretaryship.

Sincerely looking forward for your successful results and wishing you a bright future ahead.

With Best Wishes

CS Makarand Lele

President, ICSI

Recommendations of Uday Kotak Committee on Corporate Governance : A Response through SEBI Board

This article aims at compiling and analysing the recommendations made by Uday Kotak Committee on Corporate Governance, which are duly accepted by the SEBI Board.

Gaurav N Pingle – Practising Company Secretary, Pune

Email ID : gp@csgauravpingle.com

Background

SEBI Committee on Corporate Governance was formed on 2nd June, 2017 under the Chairmanship of Mr. Uday Kotak with the aim of improving standards of corporate governance of listed companies in India. The Committee has submitted its Report on 5th October, 2017. SEBI Board[1], in its meeting held on 28th March, 2018, accepted several recommendations of the Committee. In certain cases, the SEBI Board has resolved to refer certain recommendations to various agencies (i.e. Govt., other regulators, professional bodies, etc.). In the SEBI Press Release[2], there is no specific reference of the rejection of recommendation made by Uday Kotak Committee. The response of the SEBI Board to the recommendations is in three forms:

- Accepted without any Modification,
- Accepted with Modification,
- Referring the Recommendations to various Agencies.

Kotak Committee's Recommendation Accepted by SEBI Board without any Modification

The SEBI Board accepted the following recommendations on the Corporate Governance made by Uday Kotak Committee :

- Reduction in the maximum number of listed entity directorships from 10 to 8 by 1st April, 2019 and to 7 by 1st April, 2020
- Expanding the eligibility criteria for independent directors
- Enhanced role of the Audit Committee, Nomination and Remuneration Committee and Risk Management Committee
- Disclosure of utilization of funds from QIP/ preferential issue
- Disclosures of auditor credentials, audit fee, reasons for resignation of auditors, etc.
- Disclosure of expertise/skills of directors
- Enhanced disclosure of related party transactions (RPTs) and related parties to be permitted to vote against RPTs
- Mandatory disclosure of consolidated quarterly results with effect from financial year 2019-20,
- Enhanced obligations on the listed entities with respect to subsidiaries,
- Secretarial Audit to be mandatory for listed entities and their material unlisted subsidiaries under SEBI LODR Regulations.

On the point relating to increase in the eligibility criteria of independent directors, the Committee had recommended as follows:

- Specific exclusion of persons who constitute the 'promoter group' of a listed entity

1. SEBI Press Release No. 9 / 2018 dated March 28, 2018.
2. SEBI Press Release No. 9 / 2018 dated March 28, 2018.

- Requirement of an undertaking from an independent director that he / she is not aware of any circumstance or situation, which exists or may be reasonably anticipated, that could impair or impact his/her ability to discharge his/her duties with objective independent judgments
- Board of the listed entity taking on record such declaration given by Independent director
- Exclude 'board inter-locks' arising due to common non-independent directors on boards of listed entities.

The introduction of a declaration from an independent director that he/she is not aware of a particular circumstance or situation, intends to protect the interest and independence of independent director. The role of the Audit Committee has been enhanced, whereby the Audit Committee should be required to scrutinize the end-utilization of funds where the total amount of loans/advances/investment from the holding company to the subsidiary exceeds Rs. 100 crore or 10 per cent of the asset size of the subsidiary, whichever is lower. The SEBI Board has only enhanced disclosure of related party transactions; however compliance for such transactions has not changed or aligned with the Companies Act, 2013. With an objective to bring in more transparency and accountability, the SEBI Board has accepted Uday Kotak Committee's recommendation of making appropriate disclosures with reference to utilisation of proceeds of preferential issues and Qualified Institutional Placements till the time such proceeds are utilised. The mandatory Secretarial Audit for listed entities and its material unlisted subsidiaries (under SEBI's Listing Regulations) is in line with the theme of strengthening group oversight and improving compliance at a group level.

Kotak Committee's Recommendation accepted by SEBI Board with certain Modifications

The SEBI Board has accepted the following recommendations on the Corporate Governance with certain modifications:

- Minimum 6 directors in the top 1000 listed entities by market capitalization by 1st April, 2019 and in the top 2000 listed entities, by 1st April, 2020
- At least one woman independent director in the top 500 listed entities by market capitalization by 1st April, 2019 and in the top 1000 listed entities, by 1st April, 2020
- Separation of CEO/MD and Chairperson (to be initially made applicable to the top 500 listed entities by market capitalization with effect from 1st April, 2020)
- Quorum for Board meetings (one-third of the size of the Board or three members, whichever is higher) in the top 1000 listed entities by market capitalization by 1st April, 2019 and in the top 2000 listed entities, by 1st April, 2020
- Top 100 entities to hold AGMs within 5 months after the end of financial year 2018-19, *i.e.*, by 31st August, 2019
- Webcast of AGMs will be compulsory for top 100 entities by market capitalization with effect from financial year 2018-19

Shareholder approval (majority of minority) for Royalty/brand payments to related party exceeding 2 per cent of consolidated turnover (instead of the proposed 5 per cent)

One of the most significant recommendations accepted by the SEBI Board is separation of CEO/MD and Chairperson. It is proposed that such amendment is to be initially made applicable to the top 500 listed entities by market capitalization with effect from 1st April, 2020. The decision will have a significant impact on the promoter-driven companies in India. The compulsory webcast of the Annual General Meetings (applicable for Top 100 entities by market capitalization with effect from financial year 2018-19) will have positive impact on the shareholder's participation in the general meeting; however the cost of compliance (with reference to the webcast) will increase for these companies.

Kotak Committee's Recommendation Referred to certain Agencies

The SEBI Board decided to refer certain recommendations to various agencies, considering

that the matters involved relate to them. Such recommendations include the following:

- Strengthening the role of ICAI
- Internal financial controls
- Adoption of Ind-AS
- Treasury stock
- Governance aspects of PSEs

For the above issues, SEBI has decided to communicate independently with certain agencies: Government (with reference to governance aspects of PSEs), other regulators (like MCA), and professional bodies (ICAI with reference to the role and Ind.-AS), etc. Based on the discussion, SEBI may independently issue circulars or notifications in the matter.

Conclusion

The recommendations made by the Committee and approved by the SEBI Board aims towards aligning corporate governance standards to global best practices. Consequently, the SEBI Board has amended SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

KNOWLEDGE UPDATE

COMPANY LAW

Clarification on Condonation of Delay Scheme, 2018

Central Government, vide General Circular No. 05/2018 dated 17th May, 2018, has clarified Condonation of Delay Scheme (CODS), 2018 to the following effect:

- Para 4(v) of the General Circular No.16/2017 dated 29th December, 2017, stated that "in the event of defaulting companies whose names have been removed from the register of companies under section 248 of the Companies Act, 2013 ('the Act'), and which have, filed applications. For revival under section 252 of the Act up to the date of this scheme, the Director's DIN shall be re-activated only NCLT order of revival subject to the company having filing of all overdue documents". Accordingly, in such cases the Registrar(s) of Companies shall raise a ticket through Change Requirement Form (CRF) on MCA21 portal along with copy of NCLT order and e-governance shall activate DIN of the directors of such struck off companies that have been revived through NCLT to file e-CODS. 2018.

Companies (Registration Offices and Fees) (Second Amendment) Rules, 2018.

Central Government has amended the Companies (Registration Offices and Fees) Rules, 2014 by substituting proviso to sub-rule (3) of rule 10 which mandates the Registrar to allow fifteen days' time for re-submission in case of reservation of a name through web service and also prescribe additional fee of Rs. 100 per day effective from 1st July, 2018 for delayed in filing of annual return and financial statements.

Companies (Specification of Definitions Details) (Amendment) Rules, 2018

Central Government has amended the Companies (Specification of Definitions Details) Rules, 2014 by omitting clause (*r*) of sub-rule (1) of rule 2 which states the total share capital for the purposes of clause (*6*) and clause (*87*) of section 2 of Companies Act, 2013.

Women Directors in Corporate Board

In order to empower women in India, second proviso to sub-section (1) of section 149 of the Companies Act, 2013 mandates that there should be at least one women director on Board of Directors of a listed company and in every public company having a prescribed threshold. Under this background this article intends to highlight role of women director as per the provisions of the Act.

Saurabh Sharma – Company Secretary

Email ID : saurabhsharma057@gmail.com

Appointment of Women Director

As per second proviso to sub-section (1) of section 149 of the Companies Act, 2013 (the Act) read with rule 3 of the Companies (Appointment and Qualification of directors) Rules, 2014, the following class of companies shall appoint atleast one woman director:

- every listed company;
- every other public company having;

a) paid-up share capital of 100 crore rupees or more; or

b) turnover of 300 crore rupees or more:

Paid-up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

Sitting Fee to Women Director

As per rule 4 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, a company may pay a sitting fee to a director for attending meetings of the Board or committees thereof, such sum as may be decided by the Board of directors thereof which shall not exceed one lakh rupees per meeting of the Board or committee thereof. However, for women directors, the sitting fee shall not be less than the sitting fee payable to other directors.

Time Frame for Appointment

Companies which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation. A women director may be an executive or a non–executive director or form a promoter director. Even a woman nominated as a nominee director being may satisfy this Rule. Further, a woman director appointed under section 151 as small shareholders director may be a good option.

Vacancy in the Position of a Women Director

A woman director may leave the company for any such reasons as resignation, removal, automatic vacation or retirement by rotation before the expiry of her term as a director. As per rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, any intermittent vacancy of a woman director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

Term of Women Director

A woman director can hold the position of

director until her next annual general meeting from the date of appointment and entitled for re-appointment at the general meeting. The tenure of women director is liable to retirement by rotation similar to other directors. Like any other director, a Woman Director can also tender her resignation any time before the expiry of her term by giving a notice to the company.

Qualification

The Act does not prescribe any qualification or minimum industry experience for a women director.

Duties of Directors

Following duties have been prescribed for the directors under section 166 of the Act :

- A director of a company shall act in accordance with the articles of association of the company.
- A director of the company shall act in good faith, in order to promote the objects of the company, for the benefits of the company as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.
- A director of a company shall exercise the duties with due and reasonable care, skill and diligence and shall exercise independent judgment.
- A director of a company shall not involve in a situation in which she may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.
- A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to herself or to her relatives, partners, or associates and if such director is found guilty of making any undue gain, she shall be liable to pay an amount equal to that gain to the company.
- A director of a company shall not assign his office and any assignment so made shall be void.
- If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than Rs.1,00,000 but which may extend to Rs.5,00,000.

Procedural Requirements for Appointment of Woman Director

Following are the procedural requirements which are to be followed for appointment of women directors:

- Digital Signature Certificate in Class II or Class III
- Application in the Form DIR-3 for allotment of Director Identification Number (DIN)
- Consent to act as director in Form DIR-2 pursuant to rule 8 of the Companies (Appointment & Qualification of Directors) Rules, 2014
- Intimation in Form DIR-8 in terms of the Companies (Appointment & Qualification of Directors) Rules, 2014 to the effect that she is not disqualified under sub-section (2) of section 164 of the Act
- Form MBP-1, notice of interest by director in terms of the Companies (Meetings of Board and its Powers) Rules, 2014

Conclusion

The appointment of woman director is a major step towards upliftment of women in the corporate world and also towards their involvement in corporate governance. Presently, women are seriously undermined in finding a place on the Corporate Boards. Mandatory appointment of women director will go long way to correct this imbalance.

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Merger and Acquisition : An Overview

This article provides a brief overview of the merger and acquisition under the Companies Act, 2013.

Nitin Dwivedi – Company Secretary

Email ID : cs.nitindwivedi@gmail.com

Introduction

Mergers and acquisitions (M&A) is a general term that refers to the consolidation of companies or assets. M&A can include a number of different transactions, such as mergers, acquisitions, consolidations, tender offers, purchase of assets and management acquisitions. In all cases, two companies are involved. The term 'merger' is not defined under the Companies Act, 1956 ('1956 Act') and under the Income-tax Act, 1961. However, the Companies Act, 2013 ('the 2013 Act') without strictly defining the term explains the concept. A 'merger' is a combination of two or more entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such entity into one business. Whereas 'acquisition' means the acquiring company obtains the majority stake in the acquired firm, which does not change its name or legal structure.

Definition of Amalgamation under the Income-tax Act, 1961

As per clause (*1B*) of section 2, amalgamation is defined as such if it fulfils the following conditions:

- All assets and liabilities of the transferor entity are transferred to the transferee entity
- At least three-fourths of the shareholders of the transferor entity [in value] become the shareholders of the transferee entity

In case the transferee-company is a shareholder in the transferor-company, no shares are required to be issued by the transferee-company, in lieu of such shares, on amalgamation.

Modes of M&A

An acquisition can be structured in any of the following ways subject to commercial considerations:

- Share acquisition
- Asset acquisition
  - Acquisition of the entire business
  - Acquisition of individual assets
- Merger
- Demerger

Share Acquisition

In a share acquisition, the acquirer purchases the equity interest in the target entity from the sellers or owners of the business and becomes the equity owner of the target entity. The consideration for a share acquisition is typically in the form of cash. However, in more recent times, stock swap deals have also been structured.

Asset Acquisition

An asset acquisition can broadly be of two kinds:

- Acquisition of the entire business
- Acquisition of individual assets

A business acquisition entails acquisition of a business undertaking as a whole, meaning that

assets and liabilities which together constitute a business activity are acquired for a lump sum consideration. On the other hand, the acquisition of individual assets involves purchase of assets separately, not necessarily constituting an entire business undertaking.

Merger

In a merger, two or more companies consolidate to form a single entity. The consolidation is undertaken through a National Company Law Tribunal ('NCLT') approved process wherein all the assets and liabilities of the transferor entity, along with all employees, get transferred to the transferee entity and the transferor entity is automatically dissolved by virtue of the merger. As a consideration for the merger, the transferee entity issues its shares to the shareholders of the transferor entity.

Demerger

Unlike amalgamation, in a demerger, only the identified business undertaking gets transferred to the transferee entity and the transferor entity remains in existence post demerger. A demerger is an effective tool whereby a running business is hived into a separate company, so as to segregate core and non-core businesses, achieve management focus on core business, attract investors or exit a non-core business. However, like amalgamation, a demerger is also undertaken through a NCLT approved process wherein all the assets and liabilities, along with employees of the identified business undertaking, are transferred to the transferee entity on a going concern basis. As part of the demerger consideration, the transferee entity issues its shares to the shareholders of the transferor entity. Here, "Undertaking" shall include any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole but does not include individual assets or liabilities or any combination thereof not constituting a business activity.

Mergers and Amalgamations under Companies Act, 1956 and Companies Act, 2013 : A Key Comparison

Jurisdiction

Under the 1956 Act, respective High Court's, which has jurisdiction over transferor and transferee company, had power to sanction any compromise or arrangements with creditors and members if satisfied that company or any other person by whom an application has been made (by way of first motion Petition) has disclosed all material facts relating to company with an affidavit such as latest financial position of the company, accounts of the company, latest auditor's report etc. However, under the 2013 Act, NCLT deals with M&A cases. Provisions of section 230 of the 2013 Act provide the additional disclosure if the proposed scheme involves; Reduction of share capital or the scheme is of corporate debt restructuring; consented not less than 75 per cent in value of secured creditors, every notice of meeting about scheme to disclose valuation report explaining affection various shareholders. NCLT is one specified body dealing with cases opposed to multiple High Courts in case of the companies falling under the jurisdiction of different high courts.

Global Merger (Cross Border Insolvency)

According to the provisions of the 1956 Act, inbound merger (foreign company merges into an Indian company) was permissible; however, outbound merger (Indian company cannot merge with foreign company) was not allowed. For example: Ranbaxy-Daiichi Sankyo merger, cross border merger allowed under the 1956 Act as long as the acquirer/ transferee is Indian company. However, under the provisions of the 2013 Act, inbound and outbound foreign company merger are allowed, which means foreign company merging into Indian company and Indian company merging into foreign company could be done with the RBI approval. This section has widened the scope for Indian companies as now they have both options of arrangement. Prior approval of RBI is mandatory and only after receiving RBI's approval, an application can be

made by the Indian company with the jurisdictional NCLT.

Valuation Report

Both sides of companies for M&A deal will have different ideas about the worth of a target company: Its seller will tend to value the company at as high of a price as possible, while the buyer will try to get the lowest price that he can. The 2013 Act makes it mandatory that notice of meeting to discuss a scheme must be accompanied by valuation report prepared by an expert whereas the 1956 Act was silent on disclosing the valuation report to the stakeholders, as a matter of transparency and good corporate governance. Courts also required annexing of the valuation report to the application submitted before them.

Objection to Scheme

As per provisions of the 2013 Act, scheme can be objected only by shareholders having not less than 10 per cent shareholding or creditors whose debt is not less than 5 per cent of total outstanding debt as per the last audited financial statement. Whereas under provisions of the 1956 Act there was no such limit which stated that a person holding even 1 per cent of shareholding in the Company can object the scheme.

Scheme of compromise and arrangement

According to provisions of the 1956 Act scheme to approved by three-fourth value of creditors or members, agree to scheme, then it will be binding, if sanctioned by court as stated under sub-section (2) of section 391, voting in person or a proxy at meeting. E-Voting is not permitted under the 1956 Act. However, under the provisions of the 2013 Act, scheme is to be approved by three-fourth of creditors or members, agree to scheme, then it will be binding, if sanctioned by NCLT as stated under sub-section (6) section 230. The 2013 Act additionally allows the approval of the scheme by postal ballot. Postal ballot gives an equal opportunity of vote to all stake holders. E-voting is permitted under the 2013 Act. Therefore, concept of e-voting is introduced under section 108 of the 2013 Act read with rule 20 of the Companies (Management and Administrative) rules, 2014, deal with exercise of right to vote by member by electronic means. Therefore, postal ballot system and e-voting will protect the shareholders interest and will also increase the participation of shareholders of the company in voting.

Fast track merger

Fast track merger is the new concept which is governed by the provisions of section 233 of the 2013 Act. Fast track merger is merger between two or more small companies, holding company and its wholly owned subsidiary and such other company as may be prescribed. Fast track merger does not involve court or tribunal, even approval of the NCLT is not required. The Board of directors of both the companies needs to approve the scheme. However, notice has to be issued to the Registrar of Companies ('ROC'), official liquidator and other interested persons, i.e., Income-tax Department and objections/ suggestions received from the said authorities has to be placed before the members. The scheme needs to be approved by members holding at least 90 per cent of the total number of shares or by creditors representing nine-tenths in value of the creditors or class of creditors of respective companies and 75 per cent in number of the creditors or class of creditors of respective companies. Once the scheme is approved, notice would have to be given to the Central Government (Regional Director), ROC and official liquidator. Regional Director will issue the confirmation order of merger under fast track merger. The NCLT may confirm the scheme or order as normal merger under section 232 of the Act. Therefore, fast track merger will be a speedy process as it does not require approval for the NCLT. It opens the scope for small companies who wanted to merge and can propose the scheme of merger or amalgamation through their Board of directors.

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Due Diligence for Banks – An Area of Practice for Practising Company Secretary

This article discusses obligations of all scheduled commercial banks to obtain regular due diligence report by a professional, preferably a practicing company secretary

Kishan R. Thoria - CS Management Trainee, Mumbai

Email ID : krthoria@gmail.com

Introduction

The Reserve Bank of India (RBI), vide its Circular No. DBOD No. BP. BC.46/ 08.12.001/2008-09 dated 19th September, 2008, advised all the scheduled commercial banks (excluding regional rural banks and local area banks) to obtain regular 'diligence report' by a professional, preferably a practicing company secretary (PCS). Further, RBI, vide its Circular dated 21st January, 2009 also advised all primary urban co-operative banks to obtain diligence report.

Why Due Diligence

Diligence report covers many critical and relevant matters (in total 25 matters) such as details of the Board of directors, shareholding pattern, details of the forex exposure, overseas borrowings, risk mitigation through insurance cover in respect of all assets, payment of all statutory dues and other compliances, proper utilization/end-use of the loan funds, compliance with mandatory Accounting Standards, compliance with Listing Regulations prescribed by SEBI in case of a listed company, etc. The comprehensive structure of the diligence report under its twenty-five paragraphs makes it obligatory for a PCS to prepare the report after critical examination of all relevant records and documents of the borrowing companies which requires a high degree of skill and knowledge.

Procedure to be Followed

Before commencing with any assignment of RBI due diligence report, it advisable to prepare a comprehensive list of documents required to be inspected during the due diligence process and send the same to the client company in advance so that necessary arrangements for its inspection can be made. Documents required to be inspected generally includes the following:

- Constitutional documents of the company such as memorandum of association (MoA) and articles of association (AoA)
- Signed minutes of the all the meetings held during the relevant period
- Shareholding pattern of the company and relevant changes therein
- Signed or provisional financial statements of the company for the relevant period
- Details & bifurcation of forex exposure and overseas borrowings made by the company
- Copies of insurance policies obtained by the company on it's assets
- Details of obligations of company with respect to payment towards various statutory dues
- E-forms filed with Registrar of Companies during the relevant period
- List of related parties and transactions entered into with them during the relevant period

- List of various cases filed by the company and filed against the company during the relevant period.

Above list of documents is merely indicative one and while carrying out assignment of diligence report, a professional may require other documents depending on the circumstances of the relevant assignment. However, it is not always practicable for a professional to get the exact idea of the actual status of certain matters in which he/she is not involved directly or indirectly such as end use of funds borrowed by the company, disqualification of directors, show cause notices received from various statutory authorities etc., In such situation he/she may obtain a letter of 'management's representation' from the company in respect of matters where verification by PCS may not be practicable.

Management's Representation Letter and its Relevance

Management's representation (MR) letter is an undertaking by the directors or key managerial personnel of the company to the effect that that all of the information submitted is accurate, and that all material information has been disclosed to the professional for the purpose of due diligence report. Professionals typically do not allow the management of the company to materially change the contents of MR Letter as it can effectively increase the liabilities of professionals in certain cases. MR letter should be prepared with utmost level of care and caution as it is one of the crucial back up document for the professional which can serve as evidence in case of any dispute arises at any time after the issuance of the due diligence report. Intent behind the MR letter is to shift the legal burden of certain matters from the professional to the company.

Who Signs MR Letter

It is advisable to get the MR letter signed by the whole-time KMPs or the executive directors of the company who are involved in the day to day management of the affairs of the Company.

When to Obtain MR Letter

It advisable to get the MR letter signed before handing over the signed due diligence report to the company, so that subsequent changes if any therein can be carried out prior to signing of due diligence report. Thus, MR letter serves as a bullet proof jacket for the professional which prevents him from any unwarranted legal actions.

Duty to Report Qualification

Professional is required to report the qualifications in due diligence report at relevant places. It is recommended that the qualifications or adverse remarks of should be stated in thick type or in italics in the diligence report.

Professional Responsibility for False Report

With the opportunities comes responsibilities, thus it casts a great responsibility on the PCS to justify the faith reposed by the government. Failure to exercise due care may not only attract penalty and disciplinary actions for professional misconduct under the provisions of Company Secretaries Act, 1980 but also make him liable for any injury caused to any person due to his/her negligence in issuing the diligence report.

Professional Fees

Professional fees for the issuance of due diligence report can be determined based on various factors such as coverage period of due diligence report, number of man hours to likely to be invested in assignment, type of company (i.e., listed/unlisted), frequency of various corporate actions by company such as creation of charges, alterations in share capital, etc.

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Insolvency Professional Agency : A Bird's Eye View

This article provides an overview of the Insolvency Professionals Agency (IPA) envisaged in Chapter III of Part IV of the Insolvency and Bankruptcy Code, 2016 as one of the service providers and also discusses IBBI (Insolvency Professional Agencies) Regulations, 2016, which lays down the framework for regulation of IPAs

Dr. M. Govindarajan – Practising Company Secretary

Email ID : govind.ayyan@gmail.com

Introduction

Chapter III of Part IV of the Insolvency and Bankruptcy Code, 2016 (Code) provides for insolvency professional agency (IPA) which is one of the service providers under the Code. The Insolvency and Bankruptcy Board of India (Board) made 'Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016 for the purpose providing a framework for regulation of insolvency professional agencies. The IPA is required to be registered with the Board.

Eligibility for Registration

Only a company registered under section 8 of the Companies Act, 2013 (Act) is eligible to be registered as IPA. In addition, the following criteria are to be fulfilled to register with the Board:

- Its sole object is to carry on the functions of an insolvency professional agency under the Code
- Its bye-laws and governance structure shall be in accordance with the IBBI (Modern Bye-Laws and Governing Board of Insolvency Professional Agencies), 2016
- It has a minimum net worth of Rs.10 crores
- It has a paid up share capital of Rs.5 crores
- Not more than 49 per cent of its share capital is held directly or indirectly by persons resident outside India
- It is not a subsidiary of a body corporate through more than one layer (Layer means its subsidiary).
- Itself, its promoters, its directors and persons holding more than 10 per cent of its share capital are fit and proper persons. (For determining whether a person is fit and proper, Board may take account of any consideration as it deems fit, but not limited to the integrity, reputation, character, conviction or competence including financial solvency and net worth).

Registration of IPA

The following is the procedure for registration:

- The eligible company may make an application in Form A to the Board
- The fee payable is Rs.10 lakhs, non-refundable
- The Board shall acknowledge the receipt of the application within seven days of the receipt
- The Board shall examine the application and give an opportunity to the applicant to remove the defects, if any
- The Board may require the applicant to produce additional documents, information or clarification that it deems fit within reasonable time
- The Board may require the applicant to appear before the Board in person or through authorized representative within reasonable time

- The Board shall have regard to the following while giving registration to the applicant:
  - To promote the professional development of and regulation of insolvency professionals
  - To promote the services of competent insolvency professionals to cater to the needs of the debtors, creditors and such other persons as may be specified
  - To promote good professional and ethical conduct amongst insolvency professionals
  - To protect the interests of debtors, creditors and such other persons as may be specified
  - To promote the growth of insolvency professional agencies for the effective resolution of insolvency and bankruptcy process under the Code.
- The Board is also to satisfy that the applicant:
  - is eligible to apply for insolvency professional agency
  - has adequate infrastructure to perform its functions under this Code
  - has in its employment persons having adequate professional and other relevant experience to enable it to perform its functions under his Code

Once procedure has been followed, the Board may grant a certificate of registration in Form B within 60 days of the receipt of the application, excluding the time given by the Board for removing the deficiencies, or presenting additional documents, information, clarification, or appearing in person.

Conditions for Registration

The registration shall be subject to the condition that the insolvency professional agency shall-

- abide by the Code, rules, regulations and guidelines there under and its bye-laws
- at all times after the grant of certificate continue to satisfied the requirements
- seek approval of the Board when a person, other than a statutory body, seeking to hold more than 10 per cent directly or indirectly, of the share capital of the insolvency professional agency
- take adequate steps for redressal of grievances
- abide by such other conditions as may be specified.

Rejection of Application

If the Board is of the opinion that the registration ought not be granted or be granted or renewed with additional conditions, it shall communicate the reasons for forming such an opinion and give the applicant an opportunity to explain why its application should be accepted, within 15 days of the receipt of communication from the Board. The said communication is to be sent to the applicant within 45 days of receipt of the application, excluding the time given by the Board for removing the deficiencies, presenting additional documents, information or clarifications, or appearing in person, as the case may be. The Board, after considering the explanation, if any, given by the applicant may accept the application or reject the application by order giving reasons. Such order shall be communicated to the applicant within 30 days of receipt of the application.

Renewal of Registration

The validity period of registration is one year from the date of registration. The Agency shall renew the certificate may apply to the Board six months before the expiry of the registration, in Form A along with a fee of Rs.5 lakh non-refundable. The procedure for registration shall apply to this also. The Board may reject the application after giving the reasonable opportunity to the applicant. The order rejecting an application for renewal of registration shall require the insolvency professional agency to:

- discharge pending obligations
- continue its functions till such time as may be specified, to enable the enrolment of its members with another insolvency professional agency

- comply with any other directions as considered appropriate.

Cancellation of Registration

The Board may, by order, suspend or cancel the certificate of registration granted to an insolvency professional agency on any of the following grounds:

- It has obtained registration by making a false statement or misrepresentation or by any other unlawful means
- It has failed to comply with the requirements of the regulations made by the Board or bye-laws made by the insolvency professional agency
- It has contravened any of the provisions of the Act or the rules or the regulations made there under
- On any other ground as may be specified by regulations.

No order shall be made unless the insolvency professional agency concerned has been given a reasonable opportunity of being heard. No such order shall be passed by any member except whole time members of the Board.

Surrender of Registration

The following is the procedure for surrender of registration by an Insolvency Professional Agency:

- Sate the reasons for such surrender
- Furnish details of all the pending or on-going engagements under the Code of the insolvency professionals enrolled with it
- Furnish details of its pending or on-going activities
- State the manner in which it seeks to wind up its affairs as an insolvency professional agency.

The Board shall publish a notice of receipt of such application within 7 days of receipt of the application on its website and invite objections to the surrender of registration, to be submitted within 14 days of the publication of the notice. After considering the application and the objections, the Board may within 30 days from the last date of submission of objections, approve the application for surrender of registration subject to such conditions as it may deem fit. The professional agency is to require discharging any pending obligations or continuing its functions till such time as may be specified, to enable the enrolment of its members with another insolvency professional agency. The Board, if it is satisfied that the requirements have been complied with, shall publish a notice on its website stating that the surrender of registration by the insolvency professional agency has taken effect.

Appeal

Section 202 provides for appeal to National Company Law Appellate Tribunal against the order of cancellation of registration or rejection of registration. Section 202 provides that any insolvency professional agency which is aggrieved by any order of the Board may prefer an appeal to the National Company Law Appellate Tribunal in such form, within such period, and in such manner, as may be specified by regulations.

Governing Body

Section 203 provides that the Board may, for the purposes of ensuring that every insolvency professional agency takes into account the objectives sought to be achieved under this Code, make regulations to specify the following:

- Setting up of a governing Board of an insolvency professional agency
- Minimum number of independent members to be on the governing Board of the insolvency professional agency
- Number of insolvency professionals being its members who shall be on the governing Board of the insolvency professional agency.

Bye Laws

Section 205 provides that the insolvency professional agencies are to make their own bye-laws. This section provides that subject to the provisions of this Code and any rules or regulations made

there under and after obtaining the approval of the Board, every insolvency professional agency shall make bye-laws consistent with the model bye-law specified by the Board.

Model bye-law

Section 196 (2) provides that the Board may make bye-laws to be adopted by the insolvency professional agencies which may provide for the following:

- Minimum standards of professional competence of the members of the insolvency professional agencies
- Standards for professional and ethical conduct of the members.
- Requirements for enrolment of persons as members which shall be non-discriminatory.
- Manner of granting membership.
- Setting up of a governing Board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board.
- Information required to be submitted by members including the form and the time for submitting such information.
- Specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members.
- Grounds on which penalties may be levied upon the members and the manner thereof.
- Fair and transparent mechanism for redressal of grievances against the members.
- Grounds under which the insolvency professionals may be expelled from the membership of the agency.
- Quantum of fee and the manner of collecting fee as members.
- Procedure for enrolment of persons.
- Manner of conducting examination for enrolment of insolvency professionals.
- Manner of monitoring and reviewing the working of insolvency professionals who are members.
- Duties and other activities to be performed by members.
- Manner of conducting disciplinary proceedings against its members and imposing penalties.
- Manner of utilizing the amount received as penalty imposed against any insolvency professional.

Functions of Insolvency Professional Agency

The following are the functions of the Insolvency Professional Agency

- Grant membership to persons who fulfill all requirements set out in its bye laws on payment of membership fee
- Lay down standards of professional conduct for its members
- Monitor the performance of its members
- Safeguard the rights, privileges and interests of insolvency professionals who are its members
- Suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws
- Redress the grievances about its functions, list of its members, performance of its members and such other information as may be specified by the regulations
- Publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

Insolvency Professional Agencies (IPA)

As on date three Insolvency Professional Agencies, as detailed below, are registered with the Insolvency and Bankruptcy Board of India:

- Indian Institute of Insolvency Professionals of ICAI
- ICSI Institute of Insolvency Professionals
- Insolvency Professional Agency of Institute of Cost Accountants of India.

Annual Compliance Certificate

Section 196(1)(*g*) of the Code mandates the Insolvency and Bankruptcy Board of India (IBBI) to monitor performance of IPAs. Vide Circular No. IPA/009/2018, dated 19th April, 2018, the Insolvency and Bankruptcy Board of India issued regarding this. Keeping in view the institutional role of the IPAs, and to facilitate monitoring of both their performance and compliance of statutory requirements, and in the interest of transparency and accountability, the IBBI, in consultation with IPAs, has devised the format of ANNUAL COMPLIANCE CERTIFICATE to be submitted by the IPAs to the IBBI and to be displayed on its website within 45 days of the closure of the financial year.

Disciplinary Action against IPA

Where any IPA has contravened the provisions of this Code or rules or regulations made there under and the Board is satisfied that there is a prima facie case, the Board may issue a show cause notice to the IPA. The show cause notice shall be in writing enclosing with copies of relevant documents and relevant portions from the report of investigation or inspection or other records. The Board may constitute a disciplinary committee for disposal of the show cause notice. The Disciplinary Committee shall dispose the show cause notice within six months of the assignment. The Disciplinary Committee is to consider the submissions made by the IPA and to pass a reasoned order in adherence to the principles of natural justice. The order in disposal of show cause notice may provide for the following:

- No action
- Warning
- Imposing penalty which shall be three times the amount of loss caused, or likely to have been caused, to persons concerned on account of such contravention; or three times the amount of the unlawful gain made on account of such contravention. Where the loss is not quantifiable the total amount of the penalty imposed shall not exceed Rs.1 crore.
- Suspend or cancel the certificate of registration of IPA

Conclusion

The three professional Institutes took the role of IPA. The three IPAs are having their own bye laws. They registered the insolvency professional and recommend the same to be registered with the Board as insolvency professional. The IPAs forward the application of an insolvency professional, for registration with the Board after taking due analysis of the applicant because the IPAs are forerunners in the corporate insolvency resolution professionals. The IPAs are rendering continuing professional support and education in this field to the insolvency resolution professionals.

KNOWLEDGE UPDATE

COMPANY LAW

Enforcement of Sections of the Companies (Amendment) Act, 2017 with Effect from 7th May, 2018

Vide Notification No. S.O. 1833(E) dated 7th May, 2018, the following sections have been enforced with effect from 7th May, 2018:

- Clause (i) and clause (xiii) of section 2
- Section 8
- Section 13
- Sections 18 and 19
- Clauses (i) and (ii) of section 21
- Clauses (iii) and (iv) of section 23
- Section 30 and 31
- Section 33
- Section 39 and 40
- Section 46
- Section 49
- Section 52
- Sections 54 to 58 (both inclusive)
- Sections 61 and 62
- First proviso to clause (i) of section 80 and clause (ii) of section 80
- Section 83
- Sections 86 to 89 (both inclusive)

COMPANY LAW

Companies (Share Capital and Debentures) (Second Amendment) Rules, 2018

Central Government has amended the Companies (Share Capital and Debentures) Rules, 2014 by omitting the words "for at least last one year" in Explanation (i) (a) to rule 8(1).

Companies (Audit and Auditors) (Amendment) Rules, 2018

Central Government has amended rules 3, 10A and 14 and omitted rule 9 of the Companies (Audit and Auditors) Rules, 2014.

Companies (Meetings of Board and its Powers) (Amendment) Rules, 2018

Central Government has inserted proviso in rule 4, amended rule 6 and substituted rule 13 of the Companies (Meetings of Board and its Powers) Rules, 2014.

Companies (Prospectus and Allotment of Securities) (Amendment) Rules, 2018

Central Government has amended the Companies (Prospectus and Allotment of Securities) Rules, 2014 by omitting rules 3, 4, 5 and 6.

Companies (Appointment and Qualification of Directors) (Second Amendment) Rules, 2018

Central Government has amended by inserting sub-rule (2) in rule 5 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

FOREIGN EXCHANGE MANAGEMENT LAW

Monitoring of Foreign Investment Limits in Listed Indian Companies

Reserve Bank of India, vide A.P. (DIR Series) Circular No. 27 [(1)/20(R)] dated 3rd May, 2018, in consultation with Securities and Exchange Board of India (SEBI), has decided to put in place a new system for monitoring foreign investment limits, for which the necessary infrastructure and systems for operationalizing the monitoring mechanism, shall be made available by the depositories.

INSOLVENCY AND BANKRUPTCY LAW

Enforcement of Sections 227 to 229 of the Insolvency and Bankruptcy Code, 2016 with effect from 1st May, 2018

Central Government, vide S.O. 1817(E) dated 1st May, 2018, has enforced provisions of section 227 to Section 229 of the Insolvency and Bankruptcy Code with effect from 1st May, 2018.

SEBI LAW

Additional Risk Management Measures for Derivatives Segment

SEBI, vide CIR/P/2018/75 dated 2nd May, 2018, has prescribed additional risk management measures that are required to be complied with and implemented by the stock exchanges/clearing corporations for derivatives segment.

Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) (Amendment) Regulations, 2018

SEBI, vide Notification No. No. SEBI/LAD-NRO/GN/2018/10 dated 9th May, 2018 has amended the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015. The amendments relate to independent executive/non-executive directors, woman directors, quorum for meetings, maximum number of directorship, secretarial audit, etc.

Recommendations of the Committee on Corporate Governance

SEBI, vide Circular No. SEBI/HO/CFD/CMD/CIR/P/2018/79 dated 10th May, 2018, has accepted most of amendments necessary to implement recommendations of the committee on corporate governance. These amendments relate to disclosures on Board evaluation, group governance unit and medium-term, long-term strategy in the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.

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KNOWLEDGE UPDATE

CASE LAW

ARBITRATION AND CONCILIATION ACT, 1996

Execution of an award decree can be filed anywhere in the country, without obtaining a transfer of the decree from the court having jurisdiction over the arbitral proceedings.

The enforcement of an award through its execution can be filed anywhere in the country where such decree can be executed and there is no requirement for obtaining a transfer of the decree from the court, which would have jurisdiction over the arbitral proceedings - *Sundaram Finance Ltd.* v. *Abdul Samad,* CA No.1650 of 2018 (SC) dated 15th February, 2018.

COMPANIES ACT, 2013

Refusal to register transfer of shares can be permitted on the ground of violation of law or any other sufficient cause. Conflict of interest can also be a cause.

Where the appellant-company takes specific grounds in the appeal raising questions of law regarding its right to refuse registration of transfer of shares on sufficient ground the appeal being a statutory appeal under section 10F of the Companies Act, 1956, the High Court should have considered the same among other questions of law - *Mackintosh Burn Ltd.* v. *Sarkar & Chowdhury Enterprises (P.) Ltd.*, CA Nos. 3322-3323 of 2018 (SC) dated 27th March, 2018

Section 232, read with section 233, provides a complete code and the principle of single window clearance

For sanction of a scheme of arrangement/ amalgamation by the Tribunal, section 232, read with section 233, provides a complete code and the principle of single window clearance. It further permits all formal compliances with the Act required for implementing the scheme to be formalised in a single petition. The Tribunal has powers to sanction proposals containing the change of name, combination of authorised share capital of the transferor-company into the transferee-company and combination of authorised share capital of demerged company into the transferee-company - *Interglobe Enterprises Ltd. and others, In re.*, CP No. 26 of 2016 (NCLT) connected with CA No.126 of 2016 dated 24th November, 2017

INSOLVENCY AND BANKRUPTCY CODE, 2016

Resolution plan approved by the committee of creditors and Adjudicating Authority is binding on all concerned including 'corporate debtor' and 'personal guarantor'.

Where the 'resolution plan' is approved by the 'committee of creditors' under sub-section (4) of section 30 and if the same meets the requirements as referred to in sub-section (2) of that section and once approved by the 'Adjudicating Authority'. It is not only binding on the 'corporate debtor', but also on its employees members, creditors, guarantors and other stakeholders involved in the 'resolution plan' including the 'personal guarantor'. The 'moratorium', declared in the corporate insolvency resolution proceedings, will not only be applicable to the property of the 'corporate debtor', but also on the 'personal guarantor where the, 'resolution plan' is approved by the Committee of creditors' – *State Bank of India* v. *V Ramakrishnan*, Company Appeal (AT) (Insolvency) No. 213 of 2017 (NCLAT) dated 28th February, 2018.